1800.

Rutherford *et al.* Plaintiffs in Error, *versus* Fisher *et al.*

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ERROR from the Circuit Court of *New-Jersey*, sitting *in Equity*. It appeared, that the defendants in the Circuit Court had pleaded the statute of limitations to the bill of the complainants; and that the plea was over-ruled, and the defendants ordered to answer the bill. On this decree the present writ of error was sued out, and *Stockton* (of *New-Jersey*) moved to quash the writ, because it was not a *final decree*, upon which alone a writ of error would lie, 1 *vol.* 61, 62. *s.* 22. *E. Tilghman*, for the plaintiff in error, acknowledged the force of the words "final judgment," in the act of congress; and submitted the case without argument.

CHASE, *Justice*. In *England* a writ of error may be brought upon an interlocutory decree or order; and until a decision is obtained upon the writ, the proceedings in the Court below are stayed. But here the words of the act, which allow a writ of error, allow it only in the case of a final judgment.

By the COURT: The writ must be quashed with costs.

Blaine *versus* Ship Charles Carter *et al.*

THIS was an *appeal* from the Circuit Court of *Virginia*; and the preliminary question discussed was, whether such a process could be sustained? After argument,

The COURT decided, that the removal of suits, from the Circuit Court into the Supreme Court, must be by writ of error in every case, whatever may be the original nature of the suits.

Course *et al. versus* Stead *et Ux. et al.*

ERROR from the Circuit Court of the *Georgia* district, sitting *in Equity*. On the record it appeared, that upon the 5th of *May* 1795, an order had been made, in the case of *Stead et al. executors of Stead*, v. *Telfair et al.* the legal representatives of *Rae* and *Somerville* (1) "that 3634*l.* 14*s.* 7*d.* sterling, with in-
"terest at 5 per cent. from the 1st of *January* 1774, to the 5th
"of *May* 1795, deducting interest from the 19th of *April* 1775,
"till the 3d of *September* 1783, be paid to the complainants
"in that suit, with 5 per cent. on the amount of principal and in-

(1) The order was made when BLAIR, *Justice*, presided. The deduction of interest during the war, (this being a *British* debt) has not received the sanction of all the federal Judges. See 2 *Dall. Rep.* 104. *in note.*

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" terest, for making the remittance to *Great Britain*. That the 1800.
" partnership property of *Rae* and *Somerville* admitted by the de-
" fendants to be in their hands, be first applied to the payment of
" the complainants. That the lands belonging to *J. Rae* or *J.*
" *Somerville*, deceased, referred to in the answers of the several
" defendants, and the title deeds of which they admitted to be in
" their possession, be sold by the marshal, and the proceeds be
" applied to satisfy the decree; the deeds to be deposited with
" the clerk in three months."

On the 15th of *November* 1796, a second order was made by consent (PATERSON, *Justice*, presiding) upon the report of the clerk, that, on the 4th of *January* 1796, there remained due to the complainants 11,196$\frac{17}{100}$ dollars, "that the partnership pro-
" perty of *Rae* and *Somerville*, in the hands of *Telfair* be sold, and
" the bonds, &c. delivered over under a general assignment. That
" if these assets are not sufficient to pay the debt, the remainder
" of *Somerville's* property be sold; and, after paying a prior
" judgment, shall be applied to the debt of the complainants.
" That a bond admitted by *W. Stephens*, one of the defendants,
" to be in his hands, given by *R. Whitfield* & Co. to *J. Rae*,
" senior, be delivered to the complainants. That certain negroes,
" in the custody of *S.* and *R. Hammond*, and *J. Habersham* be
" sold, and applied to the payment of the complainants' debt."

On the 2d of *May* 1797, *Elizabeth Course*, executrix of *Daniel Course*, was made a defendant, upon motion of the solicitor for the complainants; and on the 2d of *April* 1798 the supplemental bill was filed, which gave rise to the present writ of error, and on which a subpœna issued only against *Elizabeth Course*. This bill set forth the original bill of *Stead et al.* v. *Telfair et al.*; the orders and decrees, above stated; and the out standing balance on the 4th of *April* 1798, amounting to 8,479$\frac{58}{100}$ dollars. It then alleged "that *J. Rae*, senior, was seised, in his lifetime, of a
" tract of 450 acres of land, which was subject to the decree in
" favour of the complainants; and that *Elizabeth Course* held the
" said tract of land unjustly, and without title. And it concluded
" with praying a discovery of the title, and surrender of the pre-
" mises in satisfaction of the decree; and that the other defen-
" dants may disclose assets, &c."

On the 3d of April 1799, *Elizabeth Course* filed an answer to the supplemental bill, in which she set forth, "that she found
" among her late husband's papers, a deed of the 5th of *May* 1792,
" executed by *F. Courvoise*, tax collector of *Chatham* county to
" him, as purchaser at public auction, of the said tract of land, for
" 128*l.* 19*s.* 4*d.* for which a receipt was indorsed, and the deed
" recorded on the 24th of *October* 1792. That in virtue of the
" deed, possession was taken of the premises. That she believed
" the land came to *J. Rae*, by devise, or descent, from his father,
" was sold for non-payment of taxes, and was purchased, *bona*
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1800. "*fide*, by her late husband, whose title, in fee, is warranted by "the tax laws of the state; and as such is claimed by the defend- "ant for herself and children."

The cause was heard, upon the former decree of 1796, the supplemental bill and answer, before ELLSWORTH, *Chief Justice*, in *May* term 1799, when the COURT decreed, "that the pretended "conveyance be set aside, and held as void; and the land sold "to satisfy the debt of the complainants. Also, that certain ne- "groes in the possession of *William Stephens* and *Joseph Haber- "sham*, executors of *Samuel Elbert*, be sold and applied to the "same object, &c."

The errors assigned upon the record (which consisted of a recital of the two orders of Court, the supplemental bill and the proceedings on it, but not the original bill) were, in substance, the following:

1. It does not appear, that the partnership property was first applied to the payment of the claimants' debt, conformably to the decree of the 25th of *May* 1795: and, if so applied, it might have been sufficient.

2. The decree orders certain negroes in the possession of *Habersham* and *Stephens*, executors of *Elbert*, to be sold, whereas it was denied, that the negroes were in their hands, but it was admitted, that they were in the possession of the minor children of the said *Elbert*: and proof to the contrary was not made, nor were the children parties to the suit.

3. The negroes, presumed to be assets of *J. Ree*, are ordered to be sold, exclusively of property in the hands of the other defendants, without equality, or apportionment.

4. The facts stated in the answer are to be taken as true, since the complainants did not reply; and thence it appears, that the purchase of the land was *bonâ fide*, for a valuable consideration, under the sanction of a public officer, whose acts were annulled by the decree, without any evidence of fraud, or imposition.

5. The exhibits referred to in the supplemental bill (to wit the two orders of Court above-mentioned) were not filed with the bill, and were inadmissible as evidence.

6. That all the heirs, as well as the widow of *Daniel Course* should have been made parties, particularly the minors, who are under the peculiar protection of a Court of equity.

7. Real and personal estate are on the same footing, by the law of *Georgia*, equally under the management of executors, or administrators. And as there are other creditors to be affected by the decree, the legal representatives of *Daniel Course* should have been parties to the suit.

8. The facts, on which the decree was founded, do not appear on the record.

9. The Court had not power, under the circumstances of the case, to order the sale of real estate.

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Though this view of the record is given, for the sake of the points discussed and decided in the Circuit Court, the merits, on the errors assigned, were not discussed or decided in this Court; but the following points occurred. 1800.

I. *Ingersoll*, for the defendants in error, objected, that the writ of error was not tested as of the last day of the last term of the Supreme Court; nor, indeed, of that term at all; for, the Court had risen before the day of its teste.

Dallas observed, in answer, that there was no rule, either legislative, or judicial, prescribing the date of the teste of a writ of error; that in *Georgia* it might not be practicable, in many cases, to know the last day of the term of the Supreme Court, whose session was not limited; that if the writ is issued, in fact, after the preceding term, and returned, *sedente curia*, to the present term, it is regular; and that it is not like the case of a term intervening, between the teste of a writ of error, and the delivery of the record to the clerk of the Court. (2)

By the COURT: The objection is not sufficient to quash the writ of error. The teste may be amended by our own record of the duration of the last term; and it is, of course, amendable.

II. *Ingersoll* objected, that the writ of error was not directed to any Circuit Court; for, its address was "To the Judges of the Circuit Court, holden in and for *the district aforesaid:*" whereas no district was previously named.

Dallas, in reply, observed, that the district of *Georgia*, was indorsed on the writ, that the attestation of the record was in *Georgia*, and that the record returned was from the Circuit Court of the *Georgia* district.

By the COURT: The omission is merely clerical. We wish, indeed, that more attention were paid to the transcribing of records; but there is enough, in the present case, to amend by; and, therefore, let the omission be supplied.

III. *Ingersoll* objected, that the value of the matter in dispute does not appear upon the record, to be sufficient to sustain a writ of error. The land, which is the immediate subject of the supplemental bill, was sold for 128*l.* 19*s.* 4*d.* and that is the only criterion of its value exhibited to the Court.

Dallas. The value of the property in dispute, must be its actual value, for the purposes of jurisdiction. The price at a forced sale, for taxes, many years ago, cannot rationally be taken for the actual value of the land, with its meliorations. The Court will, therefore, permit the plaintiff in error to ascertain the fact by affidavits, on notice to the opposite party. It was so done in *Williamson* v. *Kincaid*.

(2) See *ante*, *Blair et al.* v. *Miller et al.*

1800. By the COURT: Let the rule be entered on the same terms, as in the case of *Williamson* v. *Kincaid.*

These preliminary objections to the writ being obviated, and the depositions being returned, to prove the value of the land (which was sufficient to sustain the writ of error), *Dallas* argued for a reversal of the decree of the Circuit Court on two grounds: (3) 1st. On the merits; and, 2d. On the want of a description of the parties, so as to give a federal jurisdiction.

1st. *On the merits.* The hearing on the bill and answer, operates as a tacit admission of the facts stated in the answer; which is not contradicted in any respect; and which establishes *Daniel Course's* purchase of the land in question, as a fair and valid transaction. *Hind. Pr. Ch.* 416, 7. 289. 441. The widow *Course* was not a party to the original bill; and cannot, therefore, be bound by the decree in that case. The defendants to the original bill are not parties to the supplemental bill; for, process is only prayed and issued against the widow. Yet, the decrees in the original suit are referred to as exhibits, though not filed, in the supplemental suit; and in the supplemental suit a decree is pronounced against the defendants in the original suit as well as against the widow, who is the sole defendant. Besides, the question is emphatically a question of assets to pay a debt, for which partnership property was first responsible; and the personal estates of the debtors before their real estates. Yet, no account is given of the partnership fund; and neither the minor heirs, nor other legal representatives of *Daniel Course*, are made parties to the suit, though their interest is expressly stated in the answer. *Hind. Pr. Ch.* 2. 8. 10. 420. 283, 4. *Mitf.* 39. 145.

2d. *On the want of description.* The only descriptive addition to the name of *Elizabeth Course*, throughout the record, is that she is the "widow of *Daniel Course*, deceased;" not stating that either he, or she, was a citizen of the state of *Georgia.* 3 *Dall.* 382. *Bingham* v. *Cabot.* 4 *Dall. Mossman* v. *Higginson. Turner* v. *The Bank of North America. Turner* v. *Enrille.* It would be extravagant to infer citizenship from mere residence, nor can it be successfully urged, that because the parties to the original bill (which, by the by, is not attached to the writ of error) were well described, this Court has jurisdiction on the supplemental bill, against a new party, not described, not pledged by any joint contract, and not connected in privity, or interest, with the defendants to the original bill. *Mitf.* 31.

Ingersoll, for the defendant in error, answered: 1*st. On the merits.* The decree of the Circuit Court was not pronounced simply

(3) The case was argued, on these grounds, at *Washington*, after the removal of the seat of government; but, with this intimation, it is though most convenient to continue the report under the term in which it commenced.

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on the supplemental bill and answer; but on the decrees in the original suit, which liquidated and fixed the quantum of the debt; the conveyance to *Daniel Course*; and the tax laws of the state of *Georgia*. The conveyance was charged to be a fraudulent, pretended, deed, which was a matter of fact; 3 *Dall.* 321. and it was ascertained (not merely by the inadequate consideration, but) by reference to the tax laws, which did not authorise the sale at the time, when it took place, nor, at any time, if there were personal assets; and, consequently, the Court was bound to regard it as a nullity. (4) The objection, on the score of parties, cannot prevail, against the decree, that virtually finds the conveyance to be fraudulent; and, therefore, that no one claiming under it could derive a title, or interest, in the land. Besides, the widow *Course* is the tenant in possession of the premises, and the natural object of the supplemental bill; she must be presumed to have given notice to all proper persons; and, after all, if the objection has weight, it is sufficient to answer, that no one will be bound by the decree, to whom, on principles of law and equity, it does not extend. 1800.

2d. *On the want of description.* It is not necessary to describe the parties in the supplemental suit, which is merely an incident of the original bill, and must be brought in the same Court. The citizenship, however, of the plaintiff in error, does sufficiently appear, by reasonable presumption and necessary implication. It has never been decided, that the very term *citizens* and *aliens*, must be used in the description; but, if the description fairly imports, that one party to the suit is an alien, and the other party a citizen; or that the parties are citizens of different states; the Court will assert its jurisdiction. Then, the purchase and possession of real estate announce the character of citizen; since aliens cannot purchase and hold real estate in *Georgia*; and the long residence of *Daniel Course*, the purchaser, and his family, in the state, is a circumstance strongly corroborative. If the widow is sufficiently described, to show that she was a citizen of *Georgia*; there can be no doubt that the complainants are sufficiently described as aliens.

By the COURT: Having examined the record in the case of *Bingham* v. *Cabot*, we are satisfied, that the decision there, must govern upon the present occasion. It is, therefore, unnecessary to form, or to deliver any opinion upon the merits of the cause. Let the decree of the Circuit Court be reversed.

(4) When *Ingersoll* was about to read the statutes of *Georgia*, *Dallas* observed that they were not recited on the record; and that it might be a question, whether their existence ought not to have been established, as a fact, in the Court below. But the COURT said there could be no ground to refuse the reading of a law of any of the states. It appeared, however, that, on the point of time, *Ingersoll* referred to the statute for the tax of a different year, from that in which the sale was made.